DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

CASE NBR 86-1-05530 CSH
SHORT TITLE Truesdale, Louis J.
VERSUS Aiken, Warden, et al.

DOCKETED: Sep 18 1986

Date	Proceedings and Orders
Sep 18 1986	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Oct 17 1986	Brief of respondents Aiken, Warden, et al. in opposition filed.
Oct 18 1986	Reply brief of petitioner Louis J. Truesdale filed.
Oct 23 1986	DISTRIBUTED. November 7, 1986
Jan 20 1987	REDISTRIBUTED. January 23, 1987
Feb 6 1987	REDISTRIBUTED. February 20, 1987
Feb 23 1987	REDISTRIBUTED. February 27, 1987
Mar 2 1987	REDISTRIBUTED. March 6, 1987
Mar 9 1987	REDISTRIBUTED. March 20, 1987
Mar 23 1987	Petition GRANTED. Judgment REVERSED. Dissenting opinion by Justice Powell with whom The Chief Justice and Justice O'Connor join. Opinion per curiam.

****

PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-5530

LOUIS J. TRUESDALE, JR.,

Petitioner,

v.

JAMES AIKEN, WARDEN, and the
ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

DAVID I. BRUCK
Attorney at Law

1711 Pickens Street
Columbia, S.C. 29201.
(803) 779-8080

ATTORNEY FOR PETITIONER

QUESTION PRESENTED

MAY SOUTH CAROLINA LIMIT THE RETROACTIVE EFFECT OF THIS COURT'S DECISION IN SKIPPER v. SOUTH CAROLINA TO DEATH SENTENCES WHICH WERE NOT YET FINAL ON DIRECT APPEAL WHEN SKIPPER WAS DECIDED?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-

LOUIS J. TRUESDALE, JR.,

Petitioner,

v.

JAMES AIKEN, WARDEN, and the
ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Louis J. Truesdale, Jr. prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINIONS BELOW

The per curiam opinion of the Supreme Court of South Carolina denying rehearing of the petition for writ of certiorari in this case is unreported, and is reproduced in the Appendix to this petition at A-1. The per curiam order of the Supreme Court of South Carolina dated July 5, 1986, denying petitioner's petition for writ of certiorari is unreported, and is reproduced infra at A-2.

JURISDICTION

The judgment of the South Carolina Supreme Court denying rehearing was entered on July 9, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. It also involves S.C. Code §17-27-10 (1985 Cum. Supp.), the Uniform Post-Conviction Procedure Act, which in pertinent part provides as follows:

> (a) Any person who has been . . . sentenced for a crime and who claims:
>
> (1) That the . . . sentence was in violation of the Constitution of the United States . . . [or]
>
> (6) That the . . . sentence is otherwise subject to collateral attack upon any ground of error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy;
>
> may institute, without paying a filing fee, a proceeding under this chapter to secure relief.
>
> (b) This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

STATEMENT OF THE CASE

1. Summary of pertinent facts

The sole issue presented by this petition is whether prisoners sentenced to death in violation of this Court's recent decision in Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669 (1986), may be denied the benefit of the Skipper decision solely because their death sentences were already final on direct appeal when Skipper was decided. In this case, the record of petitioner's 1983 trial and of subsequent state post-conviction relief proceedings reveal that his death sentence was imposed in violation of Skipper. At the time that Skipper was decided, petitioner's case was pending before the South Carolina Supreme Court on a petition for a writ of certiorari to review the denial of post-conviction relief. The South Carolina Supreme Court denied the writ, and petitioner sought rehearing on the basis of this Court's intervening decision in Skipper. The South Carolina Supreme Court responded

with a brief per curiam order denying rehearing on the grounds that "[t]he retroactive effect of Skipper v. South Carolina is limited to cases pending on direct appeal and shall not apply on collateral attack." The court supported this assertion with citations to Shea v. Louisiana, ___ U.S. ___, 105 S.Ct. 1065, 84 L.E.2d 38 (1985) and Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984).

2. How the Skipper issue arose in this case.

The petitioner Louis J. Truesdale, Jr. was convicted in a South Carolina state court of rape, kidnapping and murder, and was sentenced to death. At his sentencing hearing before the trial jury, he proffered in mitigation the testimony of a psychiatrist and a psychologist. Both of these expert witnesses were prepared to testify, on the basis of their evaluations of petitioner, that he would likely make a successful and nonviolent adaptation to a prison environment. State v. Truesdale, 285 S.C. 13, 328 S.E.2d 53 (1984), cert. denied, 105 S.Ct. 1878 (1985), Transcript of Record (hereinafter cited as "Tr.") at 1994-1995, 1821-1823. At the time of petitioner's trial in May, 1983, South Carolina law regarded such mitigating evidence concerning a capital defendant's likely adjustment as irrelevant and inadmissible, State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), and for this reason the trial judge ruled in an in-chambers colloquy that the testimony of the psychiatrist and the psychologist would not be admitted for the jury's consideration. Petitioner's counsel did proffer short affidavits from both of these witnesses which were marked for identification but not submitted to the jury. After a lengthy discussion of the limitations imposed by State v. Koon, Tr. 1799 to 1818, the trial judge permitted petitioner to present to the jury the testimony of a prison guard and a jail officer who stated that petitioner had been a "good prisoner" and had obeyed institutional rules and regulations while in their custody. Tr. 1823-1826. However, petitioner was expressly prohibited from offering any predictive testimony concerning the likelihood that his future behavior in confinement was also likely to be good,

Tr. 1807-1810, and he ultimately presented no expert psychiatric testimony at all in mitigation.[1]

On appeal to the South Carolina Supreme Court, petitioner asserted that the exclusion of the mitigation testimony of the psychiatrist and psychologist violated his Eighth Amendment right to present all relevant evidence in mitigation of punishment. Tr. 2003, Exception 4. The South Carolina Supreme Court denied his petition to argue that State v. Koon should be overruled or modified, and affirmed his conviction and death sentence.[2]

Petitioner thereafter sought post-conviction relief in South Carolina state court pursuant to S.C. Code §17-27-10 (1985 Cum. Supp.) on the grounds, inter alia, that he had been denied the

[1]Because the discussion at trial concerning the admissibility of the proffered psychiatric and psychological evidence occurred in chambers and was not recorded, the original trial record did not clearly reflect the basis of the trial court's exclusion of the evidence. This ambiguity was resolved at petitioner's post-conviction relief hearing, at which the evidence presented by both petitioner and the state established that the trial court had ruled petitioner's evidence of future adaptability to prison inadmissible under State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982). The pertinent facts were summarized as follows by counsel for respondents in their Return to the Petition for Writ of Certiorari in the South Carolina Supreme Court:

> The record clearly reveals that trial counsel's strategy was to utilize two expert witnesses in an attempt to prove that [petitioner] would make a suitable future environment to prison environment. However, counsel was aware, prior to trial, that such testimony had previously been ruled inadmissible by the South Carolina Supreme Court in State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982). and other related cases. Nevertheless, it was counsel's intent to preserve the issue for the record on appeal. Based on counsel's understanding of the law at the time of the trial, counsel secured the affidavits of the witnesses for inclusion in the record. Counsel's opinion concerning the admissibility of the evidence in question was confirmed during an informal in-chambers conference with the trial judge, defense counsel, and Solicitor. Counsel proffered affidavits in the interest of time and finances and based upon the anticipated ruling by the court that such evidence would be ruled inadmissible. The affidavits accurately reflected the proposed testimony of the witnesses.

Truesdale v. Aiken, Return to Petition for Writ of Certiorari at 10-11 (record citations omitted).

[2]Under Rule 8, §10 of the Rule of the South Carolina Supreme Court, the denial of petitioner's request to argue for overruling of State v. Koon precluded him from further briefing of his Lockett claim on direct appeal, and the opinion of the state Supreme Court affirming his convictions and death sentence does not discuss the issue. State v. Truesdale, 285 S.C. 13, 328 S.E.2d 53 (1984), cert. denied, 105 S.Ct. 1878 (1985).

effective assistance of counsel with respect to his trial counsel's handling of the excluded evidence of his likely future good behavior in prison. After an evidentiary hearing on the application, the state argued and the post-conviction judge found that counsel had committed no error in this aspect of their handling of the case, and that the psychiatric and psychological evidence had been excluded under State v. Koon, supra, rather than a result of any action or inaction of trial counsel. Truesdale v. Aiken, Appendix to Petition for Writ of Certiorari [in South Carolina Supreme Court] at 64-66, and see supra at 4, n. 1. The post-conviction judge therefore denied relief.

Petitioner sought discretionary review of the denial of his post-conviction relief application in the South Carolina Supreme Court by way of a petition for writ of certiorari filed which he filed on February 25, 1986. Two months later, while his petition for certiorari was still pending before the South Carolina Supreme Court, this Court declared in Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669 (1986) that the rule of State v. Koon violated the Eighth Amendment because it excluded relevant mitigating evidence from the consideration of the sentencer in a capital case. Five weeks after Skipper was announced, on June 5, 1986, the South Carolina Supreme Court summarily denied petitioner's request to consider his appeal from the denial of post-conviction relief.

3. How the retroactivity issue arose.

Upon receipt of the South Carolina Supreme Court's order denying review, petitioner filed a timely request for rehearing. In the petition for rehearing, he alleged that his death sentence had been imposed in violation of Skipper, and supported this claim with citations to the uncontroverted record evidence then before the court. The rehearing petition, which is reproduced at pages A-3 to A-4 of the Appendix to this petition, requested that the state supreme court grant review limited to the question of whether "the exclusion of mitigating psychiatric and psychological testimony concerning petitioner's likely future good behavior violate the constitutional principles set forth in Skipper v.

South Carolina." In the alternative, the petition requested "that the Court grant rehearing of his petition for writ of certiorari, summarily vacate the denial of his application for post-conviction relief and remand his case to the Chester County Court of Common Pleas for determination of the applicability, if any, of Skipper v. South Carolina to his case."

On July 9, 1986, a divided[3] South Carolina Supreme Court issued the following order:

> This case is before the Court on a petition for rehearing. Petitioner asserts he is entitled to have his death sentence vacated on the basis of Skipper v. South Carolina, 54 U.S.L.W. 4403 (U.S. April 29, 1986), which was decided while this post-conviction relief matter was pending.
>
> The retroactive effect of Skipper v. South Carolina is limited to cases pending on direct appeal and shall not apply on collateral attack. See Shea v. Louisiana, U.S. ___, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985); Solem v. Stumes, [465 U.S. 638], 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984); McClary v. State, 287 S.C. 160, 337 S.E.2d 218 (1985). The petition is therefore denied.
>
> IT IS SO ORDERED.
>
> s/ J.B. Ness C.J.
> FOR A MAJORITY

Shortly thereafter, the court granted a ninety-day stay of execution in order to permit the filing of this petition.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question of the retroactivity of Skipper v. South Carolina was first raised and decided ex mero motu by the South Carolina Supreme Court in its order denying rehearing of the petition for a writ of certiorari in this case. Infra at A-1. In that order, which purported to apply United States Supreme Court precedent,[4]

---

[3] Although no dissents were noted in the court's order, the notation that the order was signed "for a majority" indicates that a minority of the justices did not concur with the opinion and action of the court. Whenever the South Carolina Supreme Court acts unanimously in issuing a per curiam order, the order is either signed by all the justices, or is signed by the Chief Justice "for the Court."

[4] The only South Carolina case cited by the state supreme court in support of its retroactivity holding, McClary v. State, 287 S.C. 160, 337 S.E.2d 218 (1985), is a two-paragraph summary order which declared that South Carolina would not give full retroactive effect to a prior decision, State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), disapproving the use of burden-shifting mandatory rebuttable presumptions in jury instructions. In McClary, the South Carolina Supreme Court described itself to be "adopting the reasoning of Shea v. Louisiana," supra. It is thus

the state supreme court denied petitioner's request for consideration of his Skipper claim on the basis of its determination that Skipper's retroactive effect was limited to cases pending on direct appeal. South Carolina law does not provide for any method of seeking reconsideration of a denial of rehearing. Therefore petitioner was unable to take any further action to challenge this federal retroactivity holding of the South Carolina Supreme Court.

The facts of petitioner's underlying Skipper claim are summarized in the Statement. As explained there, petitioner was denied the right to introduce in mitigation of his punishment expert psychiatric and psychological testimony which tended to show that he would be nonviolent and cooperative in prison if his life was spared. On direct appeal, the South Carolina Supreme Court overruled his Eighth Amendment attack on this exclusion and affirmed his sentence of death. A state trial court denied post-conviction relief, and the South Carolina Supreme Court denied discretionary review. Because Skipper v. South Carolina had been decided during the interval between the filing of all state post-conviction appeal papers and the South Carolina Supreme Court's denial of review, petitioner sought rehearing on the grounds that Skipper required reconsideration and vacation of his death sentence, or, at a minimum, a remand to the state post-conviction trial court for consideration of the effect of Skipper on his case. This request was denied on the grounds that Skipper was not to be applied retroactively to cases already final on direct appeal.

WHY THE WRIT SHOULD BE GRANTED

In Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669 (1986), the Court applied the well-established Eighth Amendment principles of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) to strike down as unconstitutional a South Carolina rule which prohibited capital sentencing juries

---

clear that the South Carolina Supreme Court's decision in this case is based upon entirely its view of this Court's precedents governing the retroactive application of federal constitutional cases, and not upon any state law ground.

from considering a defendant's likely good behavior in confinement as a reason to spare his life. See State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982); State v. Koon, 285 S.C. 1, 328 S.E.2d 628 (1984), cert. denied, 105 S.Ct 2056 (1985). South Carolina has now sought to limit the effect of this holding by refusing to apply it in cases which had become final on direct appeal prior to Skipper. This assertion of power to execute prisoners whose sentences were imposed in violation of Lockett is utterly without constitutional warrant, and should be summarily reversed.

1. Skipper v. South Carolina did no more than apply settled constitutional principles, and therefore present no issue of retroactive application.

The Court's precedents reveal two basic reasons why Skipper v. South Carolina must be given full retroactive effect. The first and most important is simply that Skipper created no new constitutional doctrine, and thus gives rise to no genuine issue concerning retroactive application. The question before the Court in Skipper was "whether . . . the exclusion of mitigating evidence tending to show that petitioner would probably make a favorable adjustment to prison if his life was spared violated [his] rights under Lockett v. Ohio and Eddings v. Oklahoma." Skipper v. South Carolina, Pet. for Cert. at i. In answering this question, the Court first noted the "well-established" rules of Lockett and Eddings which require consideration of all relevant mitigating circumstances in capital cases. The Court then asserted that "it can hardly be disputed" that these rules were violated by the exclusion of favorable evidence bearing on the defendant's character and his probable future conduct if sentenced to life in prison. Although the favorable inferences to be drawn from the excluded evidence of the defendant's record of good behavior in jail would not have served to mitigate his culpability for the crime he committed, the Court held that "there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" 106 S.Ct. at 1671 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (plurality

opinion of Burger, C.J.) (1978)). Accordingly, the Court struck down South Carolina's limitation on such evidence as violative of Lockett and Eddings, and ordered that the petitioner in Skipper be resentenced.

It is thus plain that Skipper created no new constitutional rule, but simply applied the well-settled principles laid down in Lockett and Eddings to the particular evidentiary limitation imposed by South Carolina law. This means that the entire issue of retroactivity which the South Carolina Supreme Court detected in this case is spurious.

In this respect the present case is similar to Lee v. Missouri, 439 U.S. 461 (1979). In Lee, the Court addressed the contention that its decision in Duren v. Missouri, 439 U.S. 357 (1979), should not be applied retroactively. The Court observed that Duren "did not announce any 'new standards' of constitutional law not evident from the decision in Taylor v. Louisiana, [419 U.S. 522 (1975)]," and that for this reason "the considerations that have led us to depart from full retroactive application of constitutional holdings, see, e.g., Stovall v. Denno, 388 U.S. 293, 297 (1967), are inapplicable to juries sworn after the decision in Taylor v. Louisiana." 439 U.S. at 462. The same reasoning is obviously applicable here: the Court's dec[illegible] Skipper did not "really announce . . . a 'new' rule at [illegible]. [but] simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting).[5] In short, the petitioner in this case is no less entitled than was the petitioner in Skipper to have the legality of his death sentence measured against the constitutional standards which the Court employed in Skipper.

[5]Unlike this case, which arises from a state collateral proceeding, Lee involved the application of a constitutional rule to cases pending on certiorari from direct appeal. However, the Court's discussion [illegible] federal habeas corpus review in Lee left no doubt that Lee's retroactivity holding is not limited to cases pending on direct appeal, but extends equally to collateral review.

2. Even if a genuine question of retroactive application had been raised by Skipper, this Court's cases on retroactive application of constitutional decisions would plainly require that Skipper be accorded full retroactive effect.

The Court has traditionally considered three factors in determining the retroactive effect, if any, of "new" constitutional rules: "(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Allen v. Hardy, ___ U.S. ___, 106 S.Ct. 2878, 2880 (1986); Solem v. Stumes, 465 U.S. 638, 643 (1984) (quoting Stovall v. Denno, 388 U.S. 293, 297 (1967)). Assuming, arguendo, that this case presents a genuine issue of retroactivity, it can be seen that each of the Stovall factors weighs heavily in favor of retroactive application.

(A) "The purpose to be served by the new standards."

Even had Skipper announced new constitutional doctrine, its holding is in that category of constitutional decisions which are "regularly given full retroactive effect" because its "major purpose 'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of . . . verdicts in past trials.'" United States v. Johnson, 457 U.S. 537, 544 (1982) (quoting Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion)). As the Court explained in Williams, new constitutional doctrine designed to overcome defects in the truth-seeking process in criminal trials is invariably given "complete retroactive effect," and "[n]either good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." 401 U.S. at 653.[6] Accord, Ivan V. v. City of

[6]Because Skipper and Lockett are entirely concerned with the factual reliability of capital sentencing proceedings, the retroactivity of those cases must plainly be analyzed very differently than cases such as Solem v. Stumes, supra, which limited the retroactive effect of Edwards v. Arizona, 451 U.S. 477 (1981).

New York, 407 U.S. 203 (1972) (applying In re Winship, 397 U.S. 358, 372 (1970) retroactively); Hankerson v. North Carolina, 432 U.S. 233 (1977) (applying Mullaney v. Wilbur, 421 U.S. 684 (1975) retroactively); and see, Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) ("all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas.").

These settled principles of retroactivity doctrine are all the more compelling where capital sentencing is concerned, since such cases implicate the Eighth Amendment's requirement of special accuracy in the determination that death is the appropriate penalty. Woodson v. North Carolina, 428 U.S. 280 (1976), Gardner v. Florida, 430 U.S. 349 (1977), Eddings v. Oklahoma, 455 U.S. 104 (1982). The arbitrary and unjustifiable exclusion from the sentencing process of competent mitigating evidence tending to show that a convicted murderer's life could be spared without undue risk to society creates an intolerable risk that the defendant will be sentenced to death in error. A constitutional decision designed to eliminate this risk must therefore be applied to all cases in which the error occurred, regardless of when the sentencing decision was made.[7]

(B) "The extent of reliance by law enforcement authorities on the old standards."

Inasmuch as the limitation on mitigating evidence invalidated in Skipper plainly violated Lockett, the Court's holding in Skipper was, to say the least, "foreshadowed by earlier cases." Solem v. Stumes, supra, 465 U.S. at 646. Nor can South Carolina point to

---

In Stumes, the Court stressed that Edwards was "a far cry from the sort of decision that goes to the heart of the truth-seeking function, which we have consistently held to be retroactive . . . [but is rather] a prophylactic rule, designed to implement pre-existing rights." Id., 456 U.S. at 645.

[7]Indeed, petitioner is unaware of any reported federal or state decision prior to this one which so much as questions the retroactive effect of any of this Court's Eighth Amendment holdings related to the adequacy of the factfinding procedures employed in capital sentencing. Cf. Graham v. State, 372 So.2d 1363 (Fla., 1979) (enumerating efforts of Florida Supreme Court to review already-final death sentences so as to ensure compliance with Gardner v. Florida, 430 U.S. 349 (1977)).

any "prior rule of [constitutional] law said to be different from that announced by [Skipper]." Id. The rule of State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982) struck down in Skipper was plainly at odds with existing Eighth Amendment precedent on the day it was announced, and South Carolina cannot seriously claim any justifiable reliance on pre-Skipper constitutional doctrine as a factor weighing against full retroactive application.

(C) "The effect on the administration of justice of a retroactive application of the new standards."

South Carolina's limitation on mitigating circumstances was virtually unique among the thirty-eight capital punishment jurisdictions. With the possible exception of North Carolina, State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, 220, cert. denied, 459 U.S. 1056 (1982), no other state had expressly declared the entire issue of a capital defendant's likely future good conduct in prison to be irrelevant to the sentencing determination. Even in South Carolina, the state supreme court's published opinions suggest that only a handful of death sentences which had become final prior to Skipper were imposed in violation of that decision's holding. State v. Koon, 285 S.C. 1, 328 S.E.2d 628 (1984), cert. denied, 105 S.Ct 2056 (1985); State v. Patterson, 285 S.C. 5, 327 S.E.2d 650 (1984), cert. denied, 105 S.Ct. 2056 (1985); State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984), cert. denied, 105 S.Ct. 1878 (1985).[8] Accordingly, the impact of full retroactive application of Skipper can fairly be described as minuscule.

In sum, it would be hard to conceive of a case which more clearly requires full retroactive application than Skipper v. South Carolina. Skipper constituted no break with past decisions, but merely required South Carolina to adhere to settled Eighth

---

[8]The number of such cases may be slightly larger, since it is possible that the South Carolina Supreme Court has affirmed other death sentences without discussing the presence of Skipper violations. That, indeed, occurred in this case. There cannot be many such cases, however, since of the death sentences now final on direct appeal in South Carolina, only ten were imposed during the period between the announcement of the rule of State v. Koon on December 20, 1982, and its invalidation by this Court in Skipper on April 29, 1986.

Amendment principles. The holding of Skipper was designed to preserve the accuracy and reliability of the capital sentencing process itself. South Carolina did not justifiably rely on any pre-Skipper constitutional doctrine in fashioning its almost unique limitation on mitigating evidence in capital cases. And the impact on the adminstration of justice which will result from affording a constitutional sentencing proceeding to each of the handful of prisoners condemned in violation of Skipper is negligible. For these reasons, petitioner submits that South Carolina's effort to evade the mandate of Skipper in his case is so plainly at odds with every aspect of this Court's retroactivity doctrine as to warrant summary reversal.

CONCLUSION

The petition should be granted.

Respectfully submitted,

DAVID I. BRUCK
Attorney at Law

1711 Pickens Street
Columbia, S.C. 29201
(803) 779-8080

ATTORNEY FOR THE PETITIONER.

September 17, 1986

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-

LOUIS J. TRUESDALE, JR.,

Petitioner,

v.

JAMES AIKEN, WARDEN, and the
ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

APPENDIX

DAVID I. BRUCK
Attorney at Law

1711 Pickens Street
Columbia, S.C. 29201.
(803) 779-8080

ATTORNEY FOR PETITIONER

The Supreme Court of South Carolina

Louis J. Truesdale, Jr., Petitioner,

v.

James Aiken, Warden, et al., Respondents.

ORDER

This case is before the Court on a petition for rehearing. Petitioner asserts he is entitled to have his death sentence vacated on the basis of Skipper v. South Carolina, 54 U.S.L.W. 4403 (U.S. April 29, 1986), which was decided while this post-conviction relief matter was pending.

The retroactive effect of Skipper v. South Carolina is limited to cases pending on direct appeal and shall not apply on collateral attack. See Shea v. Louisiana, ___ U.S. ___, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985); Solem v. Stumes, ___ U.S. ___, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984); McClary v. State, 287 S.C. 160, 337 S.E.2d 218 (1985). The petition for rehearing is therefore denied.

IT IS SO ORDERED.

J. B. Ross C.J.
FOR A MAJORITY

Columbia, South Carolina
July 9, 1986

CERTIFIED TRUE COPY:
Brenda I. Healy
Deputy Clerk, S. C. Supreme Court

The Supreme Court of South Carolina

Louis J. Truesdale, Jr., Petitioner,

v.

James Aiken, Warden, et al., Respondents.

ORDER

Petition denied.

J. B. Ross C.J.
FOR THE COURT

Columbia, South Carolina
June 5, 1986

CERTIFIED TRUE COPY:
Brenda I. Healy
Deputy Clerk, S. C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Chester County

Honorable Edward B. Cottingham, Judge

LOUIS J. TRUESDALE, JR.,

Petitioner,

v.

JAMES AIKEN, WARDEN, et al.,

Respondents.

PETITION FOR REHEARING

Petiioner Louis J. Truesdale, Jr., respectfully requests rehearing of this Court's denial, on June 5, 1986, of his petition for writ of certiorari to review the dismissal of his application for post-conviction relief. This request is made on the grounds that rehearing is appropriate in light of the recent decision of the United States Supreme Court in Skipper v. South Carolina, 476 U.S. ___, 54 U.S.L.W. 4403 (April 29, 1986), which was decided following the submission of the petition for writ of certiorari in this case. As set forth in more detail in petitioner's Statement of the Case in his petition for writ of certiorari, the record of the post-conviction relief proceedings in this case reveals, and the post-conviction court's order recites, that the mitigating testimony of a psychiatrist and a psychologist was excluded under

the authority of State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982) by a ruling of the trial judge made during an in-chambers conference prior to petitioner's sentencing hearing. App. 17, line 16 to 20, line 10; App. 22, line 22 to 25, line 20; App. 31 to 33, App. 35, lines 14-24; App. 64-65. This ruling has now been revealed to have been violative of the Eighth Amendment principles set forth in Skipper v. South Carolina. For this reason, petitioner requests that this Court grant rehearing of his petition for writ of certiorari limited to the following question:

> Did the exclusion of mitigating psychiatric and psychological testimony concerning petitioner's likely future good behavior violate the constitutional principles set forth in Skipper v. South Carolina?

In the alternative, petitioner requests that the Court grant rehearing of his petition for writ of certiorari, summarily vacate the denial of his application for post-conviction relief and remand his case to the Chester County Court of Common Pleas for determination of the applicability, if any, of Skipper v. South Carolina to his case.

Respectfully submitted.

DAVID I. BRUCK
GEORGE W. SPEEDY
S.C. OFFICE OF APPELLATE DEFENSE

BY: David I. Bruck
ATTORNEYS FOR APPELLANT

June 16, 1986

The Supreme Court of South Carolina

The State, Respondent,

v.

Louis J. Truesdale, Jr., Appellant.

O R D E R

Petitioner seeks a stay of execution to allow time to file a Petition for Writ of Certiorari in the United States Supreme Court from the denial of Post-Conviction Relief in this Court.

IT IS ORDERED that a stay of execution is granted for a period of 90 days from the date of this Order.

IT IS FURTHER ORDERED that upon the timely filing of a Petition for Writ of Certiorari in the United States Supreme Court the stay shall be automatically extended until final disposition of the matter in the United States Supreme Court.

J. B. Ness C.J.

For the Court

by _____

Clerk

Columbia, South Carolina

July 11, 1986

CERTIFIED TRUE COPY

Clerk, S. C. Supreme Court

OPPOSITION

BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-5530

LOUIS J. TRUESDALE,

PETITIONER,

vs.

JAMES AIKEN, WARDEN, AND THE
ATTORNEY GENERAL OF SOUTH CAROLINA,

RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

ATTORNEYS FOR RESPONDENTS

PETITIONER'S QUESTION PRESENTED

MAY SOUTH CAROLINA LIMIT THE RETROACTIVE EFFECT OF THIS COURT'S DECISION IN SKIPPER V. SOUTH CAROLINA TO DEATH SENTENCES WHICH WERE NOT YET FINAL ON DIRECT APPEAL WHEN SKIPPER WAS DECIDED?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-5530

LOUIS J. TRUESDALE,

PETITIONER,

vs.

JAMES AIKEN, WARDEN, AND THE
ATTORNEY GENERAL OF SOUTH CAROLINA,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SOUTH CAROLINA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent, State of South Carolina, prays that the Writ of Certiorari be denied.

CITATION TO OPINION BELOW

The per curiam order of the Supreme Court of South Carolina denying rehearing for the Petition for Writ of Certiorari on July 9, 1986, pursuant to South Carolina Supreme Court Rule 50(9) is unreported and is reproduced in the Appendix at A-1. The per curiam order of the Supreme Court of South Carolina dated June 5, 1986, denying the post-conviction relief, Petitioner's petition for state writ of certiorari is unreported and is reproduced to the Appendix at A-2.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(3). The judgment was entered on July 9, 1986 after a petition for rehearing a collateral review of a state criminal conviction and sentence of death was denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States

2. It also involves S.C. Code §17-27-10 (Cum. Supp. 1985), the Uniform Post-Conviction Procedure Act, which in pertinent part provides as follows:

> a. Any person who has been ... sentenced for a crime and who claims:
>
> (1) That the ... sentence was in violation of the Constitution of the United States ...[or]
>
> (6) That the ... sentence is otherwise subject to collateral attack upon any ground of error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy;
>
> may institute, without paying a filing fee, a proceeding under this chapter to secure relief.
>
> b. This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

RESPONDENTS' COUNTERSTATEMENT OF THE CASE

This issue presented by the petition concerns whether this Court's decision in Skipper v. South Carolina 476 U.S. ___, 106 S.Ct. 1669 (1986), applies to state collateral proceedings when the issue was raised in those proceedings for the first time in a petition for rehearing when the issue was not raised in the original application for post-conviction relief or in the petition for certiorari before the State Supreme Court. In the state post-conviction proceedings, the sole issues the Petitioner raised concerning the effective assistance of counsel and

allegations concerning the application of the death penalty. (APP. pp. 2-3). These issues were the only issues raised before the court in the petition for certiorari pursuant to Rule 60(9) of the South Carolina Supreme Court Rules. After the petition was denied on June 5, 1986, he sought, for the first time, to raise a new issue not previously presented in the post-conviction proceedings and sought a remand to the Court of Common Pleas for determination of the applicability, if any, of Skipper v. South Carolina. (Petition for Rehearing, p. 2). The Supreme Court, without requiring a response from the Respondents, issued its order dated July 9, 1986, that denied the petition for rehearing.

I. PROCEDURAL HISTORY

The Petitioner, Louis J. Truesdale, Jr., is presently confined in the Central Correctional Institution of the South Carolina Department of Corrections as a safekeeper pursuant to the orders of the Clerk of Court for Chester County, South Carolina. The Petitioner was indicted at the September, 1980, term of the Lancaster County Court of General Sessions for the offenses of murder, kidnapping and criminal sexual conduct. He was subsequently convicted as charged and sentenced to death in December, 1980. On appeal to the South Carolina Supreme Court, Petitioner's convictions and death sentence were vacated, State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982), and the case was remanded for a new trial.

The case was called for trial in the Lancaster Court of General Sessions before the Honorable George F. Coleman, Resident Judge, on April 11, 1983. Following five and a half days of jury selection, the trial judge granted Petitioner's Motion for a Change of Venue on the grounds that a fair and impartial jury could not be obtained in

Lancaster County. Subsequently, the case was again called for trial in Chester County on May 9, 1983, before Judge Coleman and a jury. Petitioner was represented by Ned Gregory, II, Esquire, and Francis L. Bell, Jr., Esquire, both of the Lancaster County Bar. After a trial by jury, the Petitioner was found guilty of murder, kidnapping, and criminal sexual conduct and was sentenced to death on May 17, 1983.

Following the imposition of the death penalty by the trial judge, the Petitioner appealed his conviction and sentence to the South Carolina Supreme Court. The sentence was subject to automatic review by the South Carolina Supreme Court pursuant to §16-3-25(A), Code of Laws of South Carolina, CUM.SUPP. (1985). The Petitioner raised the following exceptions on his direct appeal:

> 1. The trial judge violated the principles of Witherspoon v. Illinois, by disqualifying the jurors Willie G. Powell and Johnnie M. McCluney on the grounds of their attitudes towards the infliction of capital punishment.
>
> 2. Appellant's rights under the Fifth Amendment and the due process clause of the Fourteenth Amendment were violated by the admission of evidence that he had asserted his right to remain silent in the face of police questioning after being advised of his constitutional rights.
>
> 3. The death sentence was imposed under the influence of prejudice, passion or other arbitrary factors.

On March 16, 1984, Petitioner's present appellate counsel, David Bruck, filed a petition to argue for overruling or modification of precedent on various issues including leave to argue that State v. Koon, 278 S.C. 528, 248 S.E.2d 769 (1982) concerning the exclusion of competent psychiatric testimony concerning rehabilitation to prison life violated the Eighth Amendment principles of Lockett v.

Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). On March 21, 1984, the Court issues its order denying the petition.

On October 31, 1984, the South Carolina Supreme Court, in a full written opinion, affirmed the Petitioner's conviction and the trial judge's imposition of the death penalty. State v. Truesdale, 285 S.C. 13, 328 S.E.2d 53, (1984). The Petitioner then filed a Petition for Rehearing on November 9, 1984. The South Carolina Supreme Court refused the Petition for Rehearing on December 8, 1984. On November 9, 1984, the Petitioner also filed a Petition for Stay of Execution so as to permit him to seek review of his conviction and death sentence by Petition for Writ of Certiorari in the United States Supreme Court. The Petitioner then filed a Petition for Writ of Certiorari in the United State Supreme Court and said Petition was denied by that Court on April 1, 1985. Truesdale v. South Carolina, __ U.S. ___, 105 S.Ct. 1878 (1985). The sole issue raised in the petition for certiorari concerned the South Carolina Supreme Court's interpretation of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. ___ (198[illegible]). No argument was presented concerning the Lockett issue. On April 26, 1985, Petitioner filed a Petition for Rehearing in the United States Supreme Court requesting a rehearing of his Petition for Writ of Certiorari. The Petition for Rehearing was denied by the United States Supreme Court on May 20, 1985. On June 6, 1985, Petitioner again filed a Petition for Stay of Execution so as to permit him to seek post-conviction relief.

II. PRESENT PROCEEDINGS

The Petitioner filed an Application for

Post-Conviction Relief dated June 6, 1985, in which he alleged that he was being held in custody unlawfully for the following reasons:

> 1. Applicant was denied effective assistance of counsel at the sentencing phase of his capital trial in that:
>
> a. Counsel failed to present readily-available testimony of a psychologist and of a psychiatrist who had conducted evaluations of the Applicant and were prepared to present substantial testimony in mitigation of his punishment.
>
> b. Counsel failed to move that the death sentence should not be imposed following the jury's recommendation, and failed to present readily - available arguments that the recommendation of death was the product of passion, prejudice, and other arbitrary factors.
>
> 2. The death penalty as actually administered in the State of South Carolina violates the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment in that:
>
> a. The death penalty has been put into effect, through the discretionary actions of South Carolina prosecutors and sentencing authorities, according to a pattern and practice by which the punishment of death is inflicted in a racially discriminatory manner upon that minority of murderers convicted of the homicides of white victims, in violation of the Eighth Amendment.
>
> b. The death penalty is imposed arbitrarily and capriciously on the basis of the geographic location of the homicide, in violation of the Eighth Amendment.
>
> c. The death penalty has been put into effect on the basis of a racially discriminatory intent on the part of South Carolina prosecutors and sentencing authorities to punish with death defendants convicted of the killing of white victims, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

(APPENDIX pp. 2-3). (APPENDIX hereinafter APP.).

The Respondents made Return dated July 10, 1985. A hearing on the merits of this matter was held on September 25, 1985. The Petitioner was present and represented by

attorneys George W. Speedy, Esquire, of the Kershaw County Bar, and David I. Bruck, Esquire, of the Richland County Bar. During the hearing, Francis L. Bell, Jr., Esquire, and Ned Gregory, II, Esquire, Applicant's trial attorneys testified. Appearing on behalf of the Respondents was Salley W. Elliott, Esquire, of the South Carolina Attorney General's Office. At the conclusion of the hearing, the Court took the matter under advisement. On October 24, 1985, the Honorable Edward B. Cottingham issued his Order denying relief in its entirety. (APP. pp. 57-68).

III. THE EVIDENTIARY HEARING

A. Assistance of Counsel

At the post-conviction relief proceeding, the Petitioner asserted that he was denied effective assistance of counsel during the sentencing phase of his capital trial because trial counsel failed to present mitigating testimony of a psychologist and psychiatrist and because counsel fail d to move that the death sentence not be imposed fo lowing the jury's recommendation on the basis that the ecommendation was a product of passion, prejudice, and other arbitrary factors. Petitioner complained that counsel presented affidavits of the two mitigating witnesses as opposed to presenting the witnesses themselves during the trial. Petitioner also complained that trial counsel should have moved that the jury's recommendation of death not be imposed based upon the brevity of the jury deliberation. (See APP. pp. 21, 22, 23). Counsel for Petitioner outlines the issues before the lower court). Petitioner did not testify during the post-conviction relief hearing but presented the testimony of trial counsel, Francis L. Bell, Jr., Esquire. Concerning the mitigating evidence from the psychiatrist and psychologist, Bell testified that

affidavits were utilized in the interest of time and money, because of the anticipated ruling by the trial court concerning the admissibility of the witnesses' testimony. (APP. p. 27, 28). The mitigating evidence from these two witnesses concerned Petitioner's future adaptability in prison. (APP. p. 28). Counsel testified that he was aware that the South Carolina Supreme Court had previously ruled on the issue of future adaptability to prison and had held that such evidence was inadmissible. (APP. p. 33). Counsel stated that he was also aware that the trial court would not deviate from precedent on this issue. (APP. pp. 34, 40). Based upon the nature of the mitigating evidence to presented by the two witnesses, the fact that the Supreme Court had previously ruled such evidence to be inadmissible and the trial court's affirmation that said testimony would not be admissible during Petitioner's trial, counsel proffered the affidavits of the two witnesses in order to preserve the point of law for the record and for appeal. (APP. p. 41; See also Trial TR. II pp. 1806-1812, concerning arguments and the court's ruling on the admissibility of similar mitigating evidence). It was counsel's opinion that the ruling by the trial court concerning the admissibility of the affidavits was a ruling as to the content and not the form of the proffer. (APP. p. 39; See also Trial TR. pp. 1821-1823, wherein counsel made it clear that the affidavits were proffered only to preserve the record).

Ned Gregory, II, Esquire, was called by Respondents and testified that the trial transcript accurately reflects the defense arguments which were made prior to proffering the affidavits concerning the admissibility of similar future adaptability testimony. (APP. p. 47). The transcript also reflects the trial court's position and

ruling concerning such evidence. (Trial TR. pp. 1806-1812). Gregory testified that the defense knew that the State would object to the testimony of the psychiatrist and psychologist. (APP. p. 47). Gregory was also aware that the evidence was not admissible and, therefore, proffered the affidavits in order to preserve the record for appeal. (APP. p. 47). Gregory also stated that, at the time he secured the affidavits from the witnesses, he was aware that such testimony had been previously deemed inadmissible. (APP. p. 48). This was later confirmed when the trial court ruled similar testimony inadmissible as well as during an informal in-chambers meeting between the State and defense counsel. (APP. p. 48). Gregory also stated that it was his understanding that the court's ruling as to the affidavit was as to the content and not the form of the proffer. (APP. p. 51).

With regard to the brevity of the jury deliberation and any possible motion, both trial counsel testified that they were not surprised at the brevity of the jury's deliberation based upon the totality of the case which had been presented to the jury throughout the trial. (APP. pp. 37-38). Counsel stated that the motion was not made because it was not a motion which was thought of at the time. (APP. p. 50). Counsel stated that it was a motion that could have been made, although counsel refused to guess whether it would have done any good or whether it was a good motion to make. (APP. p. 51).

B. Application of the Death Penalty

Petitioner also alleges as a ground for relief, that the death penalty as actually administered in the State of South Carolina violates the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

However, during the post-conviction proceeding, counsel for Petitioner conceded that Petitioner was precluded from presenting testimony concerning this claim by the decision of the South Carolina Supreme Court in Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984). (APP. p. 52).

IV. FINDING BY THE LOWER COURT

At the conclusion of the post-conviction relief proceeding, the court took the matter under advisement. On October 24, 1985, the Honorable Edward B. Cottingham dismissed and denied the Application in its entirety. The Court held that the Petitioner received the effective assistance of counsel and that the administration in the State of South Carolina of the Death Penalty was not properly before it. (APP. pp. 66, 67).

The Petitioner made a timely appeal to the South Carolina Supreme Court. A Petition for Writ of Certiorari was filed on February 27, 1986. Respondents made Return to the Petition on March 27, 1986. As stated previously, the Supreme Court denied the petition on June 5, 1986 and rehearing denied on July 9, 1986.

HOW THE FEDERAL QUESTION WAS RAISED BELOW

The issue was raised below for the first time in the petition for rehearing from a denial of a state post-conviction relief petition that was not involving the substantive issue raised in this Petition. As will more fully be set out below, the Petitioner apparently is trying to utilize these collateral proceedings that did not involve the issue to raise an issue concerning the exclusion of the evidence that would more properly have been presented in the 1985 petition for certiorari in this Court from denial of his direct appeal in which the substantive issue was raised.

We respectfully submit that the federal question was not timely raised below.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Whether or not the order concerning the limited retroactivity of Skipper v. South Carolina was correct, Petitioner's argument is without merit because the decision denying post-conviction relief rested upon independent and adequate state grounds.

Respondents concede that in its Order of July 9, 1986, the State Supreme Court denied the petition for rehearing and stated "the retroactive effect of Skipper v. South Carolina is limited to cases pending on direct appeal and shall not apply on collateral attack." Respondents further acknowledge that this Court has previously held that the raising of a federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient unless the court actually entertains the petition and expressly decides the question. Radio State WOW v. Johnson, 326 U.S. 120, 128 (1985). It is, nevertheless, well settled that the Supreme Court will not review a state court decision resting on an adequate and independent state ground even though the court may have also summoned to its support an erroneous view of federal law. "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not ... and the ground independent of the federal question is sufficient in and of itself to sustain it, this Court will not take jurisdiction." Lynch v. New York, 293 U.S. 52, 54-55 (1934). See: Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983).

Here, there was no issue concerning the propriety of the exclusion of the evidence ever presented in the state post-conviction relief proceedings. Therefore, whether

Skipper applied to collateral proceedings was not dispositive of the issues before the state court. In South Carolina, state post-conviction remedies have been held not to be a substitute for issues that were previously raised on appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Assuming that the issue could have been raised in the proceedings, it is hornbook law in South Carolina that a question or issue not raised in the lower court cannot be raised on appeal unless it involves the jurisdiction of the court, which this issue did not. Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910); Bratcher v. Ashley, 245 S.C. 421, 141 S.E.2d 109 (1965). Furthermore, where questions brought to the attention of the Supreme court on a motion for rehearing had not been presented to or passed on by the trial court and had not been raised in the exceptions, it cannot be raised for the first time in a petition for rehearing. Rogers v. Rogers, 221 S.C. 360, 70 S.E.2d 637 (1952). Rule 17 of the Supreme Court Rules of South Carolina limits the petition to the "points supposed to have been overlooked or misapprehended by the Court," whereas here he sought to amend the entire proceeding by raising a new factual and legal allegation for relief not previously presented. Clearly then, since there was no issue pending before the court involving the Skipper issue, the question presented by the Petitioner is not properly presented by the facts of record in this proceeding. For this reason, the petition for certiorari should be denied.

2. Assuming arguendo that the issue should be addressed, the state court's finding that Skipper does not apply to cases pending upon state collateral review when decided is correct.

It bears emphasis at the outset that "the choice between retroactivity and nonretroactivity in no way turns

on the value of the constitutional guarantee involved." Johnson v. New Jersey, 384 U.S. 719, 728 (1966). The Court has "firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored." Williams v. U.S., 401 U.S. 646, 651 (1971). The Court has traditionally considered the following factors in determining the retroactive effect, if any, of new constitutional rules: "(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Allen v. Hardy, ___ U.S. ___, 106 S.Ct. 2878 (1986); Solem v. Stumes, 465 U.S. 638, 643 (1984). Here, as determined by the South Carolina Supreme Court in its Order, these factors weigh in favor of nonretroactivity. Full retroactivity, even by collateral attack, should be permitted when a ruling establishes that the trial court's action is void ab initio or that the defendant's conduct was not subject to criminal punishment. United States v. Johnson, 457 U.S. 537, 550 (1982).

The Petitioner argues that Skipper v. South Carolina, supra merely applied settled precedents and the later decision did not alter the prior precedents of this Court. In State v. Koon, 285 U.S. 1, 328 S.E.2d 625 (1984)(Koon II), cert. denied, 471 U.S. ___, 105 S.Ct. 329 (1985), the South Carolina Supreme Court stated that "future adaptability to prison [is] irrelevant evidence because it does not bear on a defendant's character, prior record, or the circumstances of his offense." 285 S.C. at 3, 328 S.E.2d at 626. As stated previously, this Court denied certiorari on the issue as presented in that case.

certiorari was similarly denied on a similar issue in State v. Patterson, 285 S.C. 5, 327 S.E.2d 650 (1984), cert. denied, 105 S.Ct. 2056 (1985). Because of these apparent sanctions by this Court, the important constitutional question resolved in Skipper had been left open placing South Carolina in the tenuous portion of applying its own precedent and rule of law that had been implicitly approved by this Court. While Skipper admittedly was not a clear break with its own precedents in Lockett v. Ohio, 438 U.S. 586 (1978) or Eddings v. Oklahoma, 455 U.S. 104 (1982), it clearly disapproved a practice the Court had arguably sanctioned in the other cases (Koon and Patterson), see, e.g. Johnson v. New Jersey, supra., and overturned a longstanding and widespread practice to which this Court had never spoken, but which had a near-unanimous body of lower court authority sufficient to show a break in the attitude on the admissibility of the evidence of prison adaptability. See: State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982).

The South Carolina Supreme Court adopted Justice Harlan's view in Desist v. U.S., 439 U.S. 244 (1969) and held that Skipper is to be applied retroactively to all convictions that were not yet final at the time Skipper was rendered. That approach is the reasoned approach under these circumstances and prevents the illogical result, argued here, of seeking to reverse on collateral review, a decision on the basis of a rule of law which did not exist at the time the case was decided. As this Court stated in Shea v. Louisiana, 470 U.S. ___, 105 S.Ct. 1065, at 1070, "the determination properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not

been drawn. Somewhere, the closing must come." For these reasons, the petition for certiorari must be denied.

CONCLUSION

For each reason prescribed, the petition for certiorari must be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

By: _____
ATTORNEYS FOR RESPONDENTS

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

Columbia, South Carolina
October 16, 1986.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 86-5530

October Term, 1986

LOUIS J. TRUESDALE,

PETITIONER,

vs.

JAMES AIKEN, WARDEN, AND THE
ATTORNEY GENERAL OF SOUTH CAROLINA,

RESPONDENTS.

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Harold M. Coombs, Jr., who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and ten copies of Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of South Carolina in the above captioned case by depositing same in the U. S. mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 17th day of October, 1986.

Harold M. Coombs, Jr.
HAROLD M. COOMBS, JR.

SWORN to before me this

17th day of October, 1986.

Patty L. Weston (LS)
Notary Public for South Carolina
My Commission Expires: 2-18-91.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 86-5530

October Term, 1986

LOUIS J. TRUESDALE,

PETITIONER,

vs.

JAMES AIKEN, WARDEN, AND THE
ATTORNEY GENERAL OF SOUTH CAROLINA,

RESPONDENTS.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Harold M. Coombs, Jr., who being duly sworn, deposes and says that he served the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of South Carolina by depositing one copy of the same in the United States Mail, first class postage prepaid, and addressed to David I. Bruck, Esquire, 1711 Pickens Street, Columbia, South Carolina 29201. He further certifies that all parties required to be served have been served.

This 17th day of October, 1986.

Harold M. Coombs, Jr.
HAROLD M. COOMBS, JR.

SWORN to before me this

17th day of October, 1986.

Kathy L. Walden (LS)
Notary Public for South Carolina
My Commission Expires: 2-18-91.

REPLY BRIEF

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-5530

LOUIS J. TRUESDALE, JR.,

Petitioner,

v.

JAMES AIKEN, WARDEN, and the
ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

PETITIONER'S REPLY MEMORANDUM

DAVID I. BRUCK
Attorney at Law

1711 Pickens Street
Columbia, S.C. 29201.
(803) 779-8080

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-5530

LOUIS J. TRUESDALE, JR.,

Petitioner,

v.

JAMES AIKEN, WARDEN, and the
ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

PETITIONER'S REPLY MEMORANDUM

Respondents's main contention before this Court appears to be that the federal question presented by the petition was not adequately raised below. This argument misidentifies the question presented. The issue here is not whether petitioner's death sentence was imposed in violation of Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669 (1986), but whether South Carolina may refuse to entertain petitioner's Skipper claim on the sole ground that Skipper need not be applied retroactively to death sentences which were already final on direct appeal when Skipper was decided. Truesdale v. Aiken, ___ S.C. ___, 347 S.E.2d 101 (1986). This issue was raised and decided ex mero motu by the South Carolina Supreme Court itself in its order denying rehearing of petitioner's state collateral appeal. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." Raley v. Ohio, 360 U.S. 423, 436-37 (1959). For this reason respondents' plethora of procedural objections to the manner in which petitioner's Skipper claim was first raised is irrelevant.[1]

A second problem with the state's procedural argument stems from the well-established principle that "[t]he mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633, 2638 (1985). In this case, the South Carolina Supreme Court plainly did not rely on any state law ground in its judgment denying rehearing. Rather, its determination of the federal question is unambiguous. After concluding, purportedly in reliance on Shea v. Louisiana, 470 U.S. 51 (1985) and Solem v. Stumes, 465 U.S. 638 (1984), that Skipper does not apply on collateral review, the court stated that rehearing was "therefore" denied. Truesdale v. Aiken, supra, 347 S.E.2d at 102. The order contains nothing else. It can therefore mean only that the judgment denying rehearing resulted not from any procedural obstacle, but from the South Carolina Supreme Court's view of the retroactivity of Skipper.

It might be added that this non-retroactivity holding not only precluded immediate consideration of petitioner's Skipper claim by the South Carolina Supreme Court, but also prevented petitioner from initiating a new post-conviction relief application based on Skipper. But for South Carolina's determination that Skipper did not apply to petitioner's case, such a successive application would in all likelihood have been entertained by the South Carolina courts, since petitioner could obviously not have raised his Skipper claim in his first application filed nearly a year before Skipper was decided. S.C. Code §17-27-90 (1985) (authorizing successive applications for relief where "sufficient reason" exists for failure to raise claim in earlier application), and see Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982) (remanding

---

[1] Parenthetically, petitioner would note that respondents' brief does not deny that petitioner's death sentence was actually imposed in violation of Skipper. Indeed, the Skipper violation is apparent from respondents' recapitulation of the facts. Brief in Opposition at 4-5, 7-9, and respondents do not argue that the error "had no effect on the jury's deliberations." Skipper v. South Carolina, supra, 106 S.Ct. at 1673.

for evidentiary hearing on merits of successive post-conviction relief application).[2] The judgment actually rendered by the South Carolina Supreme Court foreclosed this possibility by declaring petitioner's Skipper claim to be noncognizable as a matter of federal constitutional law, and the correctness of this retroactivity holding is now squarely presented for this Court's determination.

Respondents' second line of defense is that the South Carolina Supreme Court's holding concerning the non-retroactivity of Skipper is correct. This argument appears to rest almost entirely on respondents' view that the South Carolina rule declared unconstitutional in Skipper had been "apparent[ly] sanction[ed]" and "implicitly approved" by this Court's orders denying certiorari in Patterson v. South Carolina and Koon v. South Carolina, ___ U.S. ___, 105 S.Ct. 2056 (1985). Brief in Opposition at 14. This argument is patently without merit, United States v. Carver, 260 U.S. 482, 490 (1927), Brown v. Allen, 344 U.S. 443, 451-452 (1953), and only underscores the spuriousness of the retroactivity issue with which the South Carolina Supreme Court has attempted in this case to evade the plain mandate of Skipper v. South Carolina.

---

[2]Respondents do not suggest that petitioner's Skipper claim has been forfeited by procedural default. Such forfeiture could not have occurred, both because petitioner actually did press his Lockett claim without success on direct appeal, State v. Truesdale, Transcript of Record at 2003 (Exception 4), Petition to Argue for Overruling or Modification of Precedent at 4, ¶4; and because South Carolina does not recognize procedural default in capital cases. State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981); State v. Drayton, 287 S.C. 226, 337 S.E.2d 216 (1985).

CONCLUSION

For the foregoing reasons, and for those set forth in his petition for writ of certiorari previously filed in this Court, petitioner submits that the writ should be granted, and that the judgment of the South Carolina Supreme Court denying retroactive effect to Skipper v. South Carolina should be summarily reversed.

Respectfully submitted,

DAVID I. BRUCK
Attorney at Law

1711 Pickens Street
Columbia, S.C. 29201
(803) 779-8080

ATTORNEY FOR THE PETITIONER

October 18, 1986

OPINION

SUPREME COURT OF THE UNITED STATES

LOUIS J. TRUESDALE, JR. *v.* JAMES AIKEN, WARDEN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF SOUTH CAROLINA

No. 86-5530. Decided March 23, 1987

PER CURIAM.

The motion of the petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Supreme Court of South Carolina is reversed. *Lockett* v. *Ohio*, 438 U. S. 586 (1978); *Skipper* v. *South Carolina*, 476 U. S. —— (1986). See also *United States* v. *Johnson*, 457 U. S. 537, 549 (1982).

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Today the Court grants certiorari and summarily reverses a decision of the South Carolina Supreme Court that had refused to apply *Skipper* v. *South Carolina*, 476 U. S. —— (1986), retroactively to cases that were final at the time *Skipper* was decided. I continue to believe that the appropriate test for applying this Court's criminal law decisions retroactively to federal habeas corpus petitions is the analysis set forth by Justice Harlan in *Mackey* v. *United States*, 401 U. S. 667, 681–696 (1971) (dissenting opinion). See *Griffith* v. *Kentucky*, 479 U. S. ——, —— (1987) (POWELL, J., concurring). In *Mackey*, Justice Harlan argued that "it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of all these cases on the basis of inter-

vening changes in constitutional interpretation." 401 U. S., at 689.[1]

Application of these principles to this case is not simple. *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), were decided before petitioner's conviction became final. Accordingly, under the retroactivity principles adopted in our recent decision in *Griffith* v. *Kentucky*, *supra*, petitioner is entitled to the benefit of those decisions. The Court appears to think that *Skipper*, *supra*, merely applied the settled principles of *Lockett* and *Eddings* to a new fact situation, and thus that petitioner also is entitled to the benefit of the Court's decision in *Skipper*.[2]

I do not agree that petitioner is entitled to the benefit of our decision in *Skipper*. I continue to think that the result in *Skipper* was "not required by our decisions in *Lockett* . . . and *Eddings*," *Skipper*, *supra*, at —— (POWELL, J., concurring in the judgment) (citations omitted). In *Lockett* and *Eddings*, the Court held that the Eighth Amendment prohibits States from excluding, at a capital sentencing proceeding, relevant evidence that tends to lessen the defendant's culpability. *Lockett* v. *Ohio*, *supra*, at 604; *Eddings* v. *Oklahoma*, *supra*, at 114. In *Skipper*, this rule was extended to require admission of evidence that was unrelated to culpability. Rather, the State was required to admit evidence relevant to the defendant's probable future conduct as a prisoner.[3] Neither the author of the plurality opinion in *Lockett* nor the author of the Court's opinion in *Eddings* agreed with the Court's decision in *Skipper*. Although I am of course bound by the Court's decision on the merits in *Skipper*, this is not incompatible with my view that *Skipper* broke new ground. Therefore, I do not believe this petitioner's conviction was incorrect under the law existing when the conviction became final. The South Carolina court decided this case in accord with the precedents existing at the time of petitioner's conviction.

I acknowledge that we cannot determine with certainty how the Court would have decided this case at the time petitioner was convicted.[4] Because of the inherent subjectivity of this determination, I do not find summary disposition of this case appropriate. Moreover, there are several questions related to this case that have not been decided by this Court's decisions. At least in the context of habeas petitions, we have not addressed the standards by which a court should determine the retroactive effect of cases like *Skipper* that arguably follow from preexisting precedents. Nor has the Court decided whether the same retroactivity rules should apply to state postconviction proceedings that apply to federal habeas proceedings. A substantial argument could be made that this is a question of state procedural law and

---

[1] Justice Harlan identified two exceptions to this rule: cases that "place . . . certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority," 401 U. S., at 692, and where there are "claims of nonobservance of those procedures that . . . are 'implicit in the concept of ordered liberty,'" *id.*, at 693 (quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937)). Neither of these exceptions is applicable to this case.

[2] The Court supports this conclusion by reference to the statement in *United States* v. *Johnson*, 457 U. S. 537 (1982), that "when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively, . . . because the later decision has not in fact altered that rule in any material way." *Id.*, at 549.

[3] The Court in *Skipper* explained: "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: 'any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.'" *Skipper* v. *South Carolina*, *supra*, at —— (quoting *Jurek* v. *Texas*, 428 U. S. 262, 275 (1976) (joint opinion of Stewart, POWELL and STEVENS, JJ.)). The "past conduct" to which the *Skipper* Court referred was Skipper's good behavior *after* his conviction and death sentence.

[4] I am not the first to note the difficulty of making these determinations. See *Desist* v. *United States*, 394 U. S. 244, 263–269 (1969) (Harlan, J., dissenting); *Mackey*, *supra*, at 695 (Harlan, J., dissenting).

that—whatever the federal rule eventually may become—state courts considering such petitions need not consider developments in constitutional law that occur after the conviction became final. Of course, we should not resolve these questions without full briefing and consideration.

If these questions were properly presented, I would vote to grant the petition for a writ of certiorari. As the more important questions are not directly raised, my vote is to deny the petition. It seems to me that summary reversal is wholly inappropriate, and accordingly I dissent.